

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

THOMAS ERICKSON,

Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH  
SERVICES,

Respondent.

) Case No. SEP-02-0003

)  
) FINDINGS OF FACT, CONCLUSIONS OF  
) LAW AND ORDER OF THE BOARD

**I. INTRODUCTION**

1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, WALTER T. HUBBARD, Chair. BUSSE NUTLEY, Member, reviewed the file and record and participated in the decision in this matter. The hearing was held at the Department of Social and Health Services Region 2 Conference Room in Yakima, Washington, on April 23, 2003.

1.2 **Appearances.** Appellant Thomas Erickson was present and was represented by Christopher Coker, Attorney at Law, of Parr & Younglove, P.L.L.C. Janetta Sheehan, Assistant Attorney General, represented Respondent Department of Social and Health Services.

1.3 **Nature of Appeal.** This is an appeal from a non-disciplinary separation pursuant to WAC 356-30-012.

1.4 **Citations Discussed.** WAC 356-30-012; Akridge v. Dep't of Social & Health Services.

## II. FINDINGS OF FACT

2.1 For historical review and discussion of the background check law, see Akridge v. Dep't of Social & Health Services, Case No. SEP-01-0001 (2003).

2.2 Appellant Thomas Erickson was a permanent employee of Respondent Department of Social and Health Services. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on May 6, 2002.

2.3 Appellant began his employment as a Juvenile Rehabilitation Residential Counselor on February 20, 1992 with the Juvenile Rehabilitation Administration (JRA) at the Parke Creek Treatment Center. The Parke Creek Treatment Center is a drug and alcohol treatment center for male youths between the ages of 12 and 21.

2.4 Following the Personnel Resources Board's adoption of WAC 356-30-012, DSHS designated all positions within the Juvenile Rehabilitation Administration as "covered positions" because of the necessary contact staff had with juveniles.

2.5 As a Juvenile Rehabilitation Residential Counselor, Appellant worked directly with juveniles as a drug and alcohol counselor with duties that included transporting youths to Alcoholics Anonymous and Narcotics Anonymous meetings, supervision of meals, serving as a group facilitator, and performing one-on-one counseling or supervision.

1 2.6 On October 17, 2001, Appellant signed a background authorization form. Appellant  
2 answered, "Yes" in response to the question, "have you ever been found to have sexually abused,  
3 physically abused, neglected or abandoned, or exploited a child or adult." Appellant indicated that  
4 he had been found guilty of two counts of sex abuse in the first degree in Oregon on May 7, 1984.

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6 2.7 On March 7, 2002, eight members of the Background Assessment Review Team (BART)  
7 met to review Appellant's Background Check Risk Assessment Documentation Form. Documents  
8 from the Grant County (Oregon) Circuit Court indicated that Appellant pled guilty to felony  
9 charges of sexual abuse in the first and second degree in 1984. Appellant engaged in sexual  
10 conduct with two of his nieces who were 12 and 15 years old. In 1986, Appellant was granted a  
11 petition to the Grant County Circuit Court to reduce his conviction from a Class "C" Felony of Sex  
12 Abuse in the First Degree to an undefined Class "A" Misdemeanor.

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14 2.8 BART decided to "automatically disqualify" Appellant from working in a covered position,  
15 however, he was not disqualified from working in a non-covered position. On April 1, 2002, Pleas  
16 Green, Regional Administrator, notified Appellant of the Background Check Central Unit (BCCU)  
17 determination that he was disqualified from working in his covered position because it allowed  
18 unsupervised access to juveniles. Mr. Green informed Appellant that he had 15 calendar days from  
19 the day he received that letter to submit a request for a "Review of Mitigating Circumstances."

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21 2.9 On April 9, 2002, following a review of Appellant's mitigating circumstances, BART  
22 notified Appellant that "after careful consideration of the information you provided, the BART  
23 determination remains unchanged."

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25 2.10 Mr. Green also received a copy of the April 9, 2002 notice from BART.  
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1 2.11 Personnel Policy 532, Section VI B, requires that BART attempt to find a suitable non-  
2 covered position within the employee's current administration before considering positions in other  
3 administrations. On April 7, 2002, Rosie Escamilla, Human Resource Consultant, generated a  
4 search of vacancies in Yakima County and the region within the salary ranges of 31 to 47. Ms.  
5 Escamilla obtained a list of vacancies as of April 14, 2002. Ms. Escamilla eliminated from  
6 consideration all vacant "covered positions." After reviewing Appellant's qualifications to the  
7 available positions, Ms. Escamilla found no vacant, permanent funded positions that could be  
8 offered to Appellant.

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10 2.12 By letter dated April 18, 2002, Mr. Green notified Appellant of his non-disciplinary  
11 separation from his position as a Juvenile Rehabilitation Residential Counselor effective May 3,  
12 2002. Mr. Green informed Appellant that "[d]ue to the nature of the Juvenile Rehabilitation  
13 Residential Counselor's duties within JRA, where all positions are covered by Personnel Policy  
14 532, job restructuring and job reassignment are not viable options. Attempts to locate a position  
15 that would represent a transfer or voluntary demotion for you were unsuccessful." The letter also  
16 advised Appellant that he could request to have his name placed and/or maintained on agency  
17 promotional registers within three years of the effective date of the action.

### 18 19 **III. ARGUMENTS OF THE PARTIES**

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21 3.1 Respondent argues that DSHS followed the procedures established by both WAC 356-30-  
22 012 and DSHS Policy 532. Respondent asserts that even though Appellant successfully petitioned  
23 the Grant County (Oregon) Circuit Court to reduce his conviction to a Class "A" Misdemeanor,  
24 those charges were not vacated or expunged from his record. Respondent contends that Appellant's  
25 crime is especially troubling because it was a sexual offense and violated a trust relationship with  
26 his two nieces. Respondent asserts that Mr. Green was unable to reassign Appellant or restructure

1 any positions within the Juvenile Rehabilitation Administration since all positions are “covered”  
2 because incumbents work directly with juveniles. Respondent argues that it was Appellant’s  
3 responsibility to provide an updated state application form prior to the vacancy run, but that he did  
4 not qualify for any of the vacant positions with or without an updated application on file.  
5 Respondent asserts that non-disciplinary separation was the only option, and therefore, the appeal  
6 should be denied.

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8 3.2 Appellant argues he was a long-term state employee with an impeccable work history.  
9 Appellant asserts that he self-disclosed his 1984 conviction and BART failed to consider and take  
10 into account his mitigating circumstances. Appellant argues that nothing he provided to BART  
11 would have changed their minds. Appellant contends that he went through treatment and “paid his  
12 debt” to society for his crime. Appellant argues that the only evidence that BART should have  
13 considered was his work history because his conviction was a Class “A” Misdemeanor rather than a  
14 felony. Appellant asserts that the agency did not ask him to provide an updated application prior to  
15 the vacancy search, and he contends that a one-time vacancy search for available positions was not  
16 a sufficient effort by the agency. Appellant argues that BART acted in an arbitrary and capricious  
17 manner and that nothing in his background indicates that he is of any danger to male juveniles.  
18 Appellant asks that he be reinstated and granted every remedy allowed by law.

#### 19 20 **IV. CONCLUSIONS OF LAW**

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22 4.1 The Personnel Appeals Board has jurisdiction over the parties and the subject matter.

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24 4.2 On an appeal of a non-disciplinary separation for background check disqualification, the  
25 appointing authority has the burden of supporting both the basis for the action taken and compliance  
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1 with the merit system law(s) or rule(s) governing the action. Akridge v. Dep't of Social & Health  
2 Services, Case No. SEP-01-0001 (2003).

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4 4.3 The scope of our review here is whether Respondent DSHS' action and application of  
5 Personnel Policy 532 complied with WAC 356-30-012. The standard of review for employee  
6 background checks is described in WAC 356-30-012(4), which states in relevant part:

7 The secretary of the department of social and health services shall use the results  
8 of a background check solely to determine the character, competence and  
9 suitability of a person for a covered position. The background check information  
shall consist of:

10 (a) Conviction records, pending charges, and disciplinary board final decisions.

11 (b) Evidence that substantiates or mitigates convictions, pending charges, and  
disciplinary board final decisions including, but not limited to:

12 (i) The employee['s] ...background check authorization and disclosure form;

13 (ii) The employee['s].... age at the time of conviction, charge, or disciplinary  
board final decision;

14 (iii) The nature and severity of the conviction, charge, or disciplinary board final  
decision;

15 (iv) The length of time since the conviction, charge or disciplinary board final  
decision;

16 (v) The nature and number of previous offenses;

17 (vi) Vulnerability of the child, vulnerable adult, or individual with mental illness  
or developmental disabilities to which the employee ... will or may have  
unsupervised access; and

18 (vii) The relationship between the nature of the conviction, pending charge, or  
disciplinary board final decision and the duties of the employee....

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20 4.4 Appellant does not dispute that he engaged in sexual conduct with two of his nieces and he  
21 pled guilty to charges of sexual abuse in the first and second degree. Appellant does argue,  
22 however, that his conviction was reduced from a Class "C" Felony of Sex Abuse in the First Degree  
23 to an undefined Class "A" Misdemeanor. If a basis for disqualification exists, the Board will not  
24 substitute its judgment for BART's evaluation of the character, competence and suitability of  
25 Appellant for a covered position. Appellant received notice from BART that he was disqualified  
26 from working in his covered position. Appellant was subsequently provided with an opportunity to

1 meet with members of BART at an in-person Mitigating Circumstances Review and present  
2 mitigating evidence as to why he should be allowed to remain working in his covered position.  
3 That mitigating evidence was reviewed by BART, who later notified Appellant that their  
4 determination remained unchanged. Therefore, Appellant remained disqualified from working in a  
5 covered position.

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7 4.5 We are troubled by BART's process of "automatically" disqualifying Appellant from  
8 remaining in a covered position prior to considering Appellant's mitigating information.  
9 Nonetheless, BART did consider Appellant's mitigating information. Therefore, the process  
10 through which BART determined Appellant was disqualified from working in a covered position  
11 was consistent with the intent of WAC 356-30-012.

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13 4.6 Under WAC 356-30-012(5)(g), "interim measures" (such as use of accrued vacation) may  
14 be used while the appointing authority "explores the availability of actions." This period of time is  
15 not to exceed 30 calendar days except in cases where there are investigations of pending charges.  
16 The appointing authority may take any of the actions provided in WAC 356-30-012(5), including  
17 job restructuring, job reassignment, voluntary demotion, voluntary resignation, nondisciplinary  
18 separation or disciplinary action for cause. WAC 356-30-012(5)(h) states: "When considering the  
19 above actions, the agency will consider the least restrictive means necessary to prevent  
20 unsupervised access [to vulnerable persons]." WAC 356-30-012(5) sets forth the alternatives  
21 beginning with the least restrictive (job restructuring) and ending with the most restrictive (non-  
22 disciplinary separation and disciplinary action for cause).

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24 4.7 Here, the Regional Administrator, Mr. Green, did not consider job restructuring or job  
25 reassignment because all positions within the Juvenile Rehabilitation Administration were  
26 "covered." Mr. Green concluded that no viable options existed for Appellant to remain an

1 employee within the Juvenile Rehabilitation Administration. The department then conducted a  
2 vacancy run to determine whether a position existed to which Appellant could transfer or  
3 voluntarily demote. The search was limited to vacancies that existed on April 14, 2002 in Yakima  
4 County and the region.

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6 4.8 Neither WAC 356-30-012 nor Personnel Policy 532 limits the procedures and/or  
7 geographical areas to search for existing vacancies under these circumstances. Furthermore, the  
8 rule anticipates that the appointing authority will conduct an active and on-going search of  
9 “available actions” during the entire 30-day period.

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11 4.9 Therefore, we conclude that the consideration of available options provided to Appellant  
12 was unduly restrictive and did not afford him a reasonable opportunity to find an alternative  
13 position with DSHS.

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15 4.10 In keeping with our decision in Akridge, the remedy for the rule violation described above  
16 will not punitively require full reinstatement and payment of back pay and allowances for the  
17 months since Appellant was separated from employment. Rather, DSHS shall conduct an expanded  
18 search for all vacancies in positions that are not covered positions and for which Appellant meets  
19 the minimum qualifications. This renewed vacancy search shall begin not later than ten days  
20 following the date of this order and will continue for a minimum period of 30 days, during which  
21 time Appellant shall be afforded all rights and benefits of employment at a salary commensurate  
22 with his position prior to separation.



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**V. ORDER**

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Thomas Erickson is granted in part and Respondent is directed to conduct an expanded search for all vacancies in positions that are not covered positions and for which Appellant meets the minimum qualifications. This renewed vacancy search shall begin no later than ten days following the date of this order and shall continue for a minimum period of 30 days, or until such time as a position is offered to Appellant, whichever is less, during which time Appellant shall be afforded all rights and benefits of employment at a salary commensurate with his position prior to separation.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2003.

WASHINGTON STATE PERSONNEL APPEALS BOARD

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Walter T. Hubbard, Chair

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Busse Nutley, Member